Circuit Court of Appeals, *County of Suffolk, N.Y. v. First American Real Estate Solutions*, 261 F.3d 179 (2d Cir.2001) ("*First American*"). *First American* dealt with the precise subject matter at issue in this case, whether a copyright held by a public body for GIS source code operated as a restriction of access to public records. The Second Circuit held that Suffolk County's copyright did not operate as a denial of access, because the information provider in that case possessed the GIS source code at issue through a request made under the New York Freedom of Information Law (FOIL)), as does the Respondent in this case. *First American*, 261 F.3d at 191-92. Rather, the court held that the copyright only restricted the subsequent sale of the records. In this case, the Second District Court of Appeal of Florida makes no effort to explain the different results despite seemingly similar public records laws, except to note that New York law is not Florida law. *MicroDecisions v. Skinner*, 889 So. 2d at 876.

I. THIS CASE RAISES THE CRITICALLY IMPORTANT QUESTION OF WHETHER A STATE COURT CAN DECIDE WHO IS ENTITLED TO HOLD A COPYRIGHT.

"The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases." 28 U.S.C. § 1338(a).

Title 17 United States Code, section 301(a), provides that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title."

Respondent can point to the Complaint and the Order Remanding the case from the District Court, based solely on the Complaint, and claim that the case is about public records, but the true nature of this case is evident in the Second District's own words in its holding: **"We hold that Skinner has no authority to assert copyright protection in the GIS maps, which are public records."** *MicroDecisions*, 889 So. 2d at 874 (Emphasis supplied). In so holding, the Second District misconstrued the law controlling its jurisdiction.

A. The Second District Court of Appeal Misconstrued the Significance of the United States District Court's Order on Remand.

The Second District incorrectly reversed the Circuit Court's decision on the basis of the order of remand from the United States District Court for the Middle District of Florida, *MicroDecisions v. Skinner*, No. 2:02-cv-639-FTM-29DNF (M.D. Fla. Feb. 5, 2003). The District Court based its decision to remand solely on the allegations in the Complaint. *See* Remand Order at 3. The Remand Order notes that "[t]he well-pleaded complaint in this case alleges that the documents are public records to which the Property Appraiser must allow access pursuant to Florida law, without further restriction. Nothing about the claims in the Complaint arise out of federal law in general or the Copyright Act in particular, and they do not satisfy the test articulated by the Eleventh Circuit." *Id.* at 4 (citations omitted). Had the District Court been favored with the information before the Second District Court of Appeal, the District Court may well have seen exactly what the Plaintiff's real issue in the case actually is: whether a Florida constitutional officer has the authority to hold a copyright.

The District Court could not consider that Respondent withheld payment of the fee for the requested GIS data files, in order to bring this as a public records case, as alleged in the Answer and demonstrated by the Affidavits. The District Court could not consider the undisputed fact that the public records at issue have already been provided, as the Answer and Affidavits demonstrated. Therefore, the District Court did not consider the fact that the public records claim was moot, concluding "that the Copyright Act does not completely preempt the state law public records access claims in the Complaint." Remand Order at 4-5.

When acting on the cross-motions for summary judgment the Circuit Court was presented with considerably more information than the allegations in the Complaint. The Answer alleges and Affidavits demonstrated that any state law public records claims in this case were brought with unclean hands, and are now moot, because the records have been provided. The sole remaining issue in this case was Petitioner's authority to claim copyright protection. No state court has ever decided this issue, and with good reason: state courts lack jurisdiction to determine issues of federal copyright law. *See* 28 U.S.C. § 1338.

The *First American* decision certainly does not hold that a state court can decide whether a state or its subdivisions have authority to claim copyright. The court in *First American* examined the authority of a state and its subdivisions to claim copyright protection. *Suffolk* County, 261 F.3d at 187. The court decided that a state and its subdivisions did have authority to claim copyright protection for GIS tax maps. *Id.* The court determined that such authority arose from the Copyright Act. *Id.* The *First American* Court then decided whether a state law abrogated the county's rights under the Copyright Act. *First American*, 261 F.3d at 188-189. The Second Circuit decided that FOIL did not abrogate the county's copyright protection. *Id.* It

certainly did not hold that the issue could have been decided by a New York state court. Indeed it could not have been so decided, because federal courts have exclusive jurisdiction to decide matters of copyright. Nothing in Florida law holds that a constitutional officer may not hold a copyright. *See also State of Wisconsin v. Law Office Information Systems, Inc.*, 230 Wis. 2d 185, 603 N.W. 2d 748, 1999 Copr.L.Dec. P 27, 947, 1999 WL 649235, page 4 (Wis. App. Table 1999)(noting that state laws promoting openness in government were not relevant to whether a copyright exists, and that the existence of a copyright was a matter of federal law). The same holds true in the present case.

Nevertheless, the Second District Court of Appeal based its analysis of the jurisdictional issues upon the Order of Remand from the United States District Court, and disregarded those portions of the record that demonstrated that what Respondent really sought was to have a court declare that Petitioner was not entitled to hold the Certificate of Registration duly issued by the Register of Copyrights of the United States of America. This misapplication is salient to this Court's review of the question presented because this is what allowed the Second District to misconstrue the law controlling its jurisdiction.

B. The Second District Court of Appeal Misconstrued the Law Controlling Jurisdiction of this Case.

At the heart of Respondent's case is its challenge to Petitioner's authority to hold a copyright in the GIS source code. Aside from the explicit holding of the Second District, addressing that very issue, examine the nature of the case in the absence of either of the Respondent's two claims, the public records claim or the copyright challenge. If one removes the public records claim from the case, one could still challenge the authority of a public official to claim

copyright protection, but remove the copyright challenge from the case, and the case is moot because the Respondent already possesses the requested records.

The Second District's misplaced focus caused it to misconstrue the law controlling its jurisdiction to decide the essential element in this case. Despite the fact that the Respondent already possessed the requested GIS map code, and that the public records claim was therefore moot pursuant to *Mazer v. Orange County*, 811 So. 2d 857, 859 (Fla. 5th DCA 2002) (holding that a public records claim is moot, save for the issue of attorney's fees, once the requested records are provided), the court proceeded to exercise jurisdiction over what it deemed a public records case, before holding that Petitioner could not hold a copyright registration. *MicroDecisions*, 889 So. 2d at 874.

Indeed, as the Second District notes, not all cases involving copyright are preempted. "Only those causes of action that involve rights equivalent to those protected by the act are preempted." *Garrido v. Burger King Corp.*, 558 So. 2d 79, 82 (Fla. 3rd DCA 1990). Section 106 of the Copyright Act states that the rights within the general scope of copyright are those which prohibit reproduction, performance, distribution or display of a work. 17 U.S.C. § 106; 1 NIMMER ON COPYRIGHT § 1.01[B] at 1-11 (1987).

In *Pincus v. Carlisle*, 585 So. 2d 1172 (Fla. 4th DCA 1991), the district court granted a writ of prohibition with directions to strike a count in a complaint that involved rights equivalent to those protected by federal patent and copyright law, and quashed the trial court's temporary injunction involving copyright issues. The district court held that the fundamental nature of the claim involved copyright, and was therefore within the exclusive jurisdiction of the federal district courts. *Id.* Similarly, in *Sparta Surf, Inc. v.*

Korda, 599 So. 2d 242, 243 (Fla. 4th DCA 1992), the district court granted a writ of prohibition because "the essence of the complaint . . . is a claim of copyright. . . ." The court noted that "[t]he fact that the complaint also attached a copy of a trademark application and filing receipt does not change what the actual pleadings allege, which is a copyright law, not a trademark claim." *Id. See also Schachel v. Closet Concepts, Inc.*, 405 So. 2d 487, 488 (Fla. 3rd DCA 1981)("if the suit is founded on a breach of a right created by the patent laws, even if that right is confirmed by separate agreement, the case arises under the patent laws, and a state court is without subject matter jurisdiction.")

Citing *Department of Health & Rehabilitative Services v. Southpointe Pharmacy*, 636 So. 2d 1377 (Fla. 1st DCA 1994), the Second District claims that Florida law supports its jurisdiction over the copyright issues in this case. The Second District notes that:

> In that case, the pharmacy filed a petition for writ of mandamus seeking documents pursuant to Florida's public records law, section 119.07, Florida Statutes. As in this case, the complaint did not allege a cause of action under the federal copyright law, but the public entity defended on the ground that the documents were copyrighted. The *Southpointe* court held that under the federal well-pleaded complaint rule a copyright *defense* does not defeat state court jurisdiction.

MicroDecisions, 889 So. 2d at 874. The Second District fundamentally misconstrues *Southpointe*. The public entity in *Southpointe* had not provided the requested transcripts, so the public records claim was not moot. Similarly, the public entity was not asserting its own copyright of the material as a

defense, it was claiming that the court reporter's copyright of the transcripts prevented it from making copies for requesting parties. Using the factual scenario from *Southpointe*, if one removes the copyright elements of the case, there is still a ripe public records claim remaining, but if one removes the public records claim, the case would be moot because nobody ever questioned the right of the court reporter to copyright her work. *Southpointe* was indeed a public records case. The present case is not.

Congress has provided with admirable simplicity and clear expression that ownership of a copyright vests in its creator. 17 U.S.C. 201(a). Congress has thus pre-empted a State's ability to enact a law, for example, declaring that no member of a particular group may hold a copyright.

The Second District Court of Appeal misconstrues a state government's ability to contract with its employees regarding ownership of the employees' creations (such as the Taxol patent held by Florida State University or the Gatorade patent held by the University of Florida) or by state law to determine who is or is not an employee, incorrectly holding that works are left available for copyright protection by the state or the individual author, "depending on state law and policy, and subject to the exceptions dictated by public policy...." *MicroDecisions*, 889 So. 2d at 874-75 (citing *Code Tech*, 628 F.2d at 735-36; *First American*, 261 F.3d at 188.)

The Second District, noting, "Florida law determines whether Skinner may claim a copyright in his office's creations," makes the giant leap to assume that Florida courts are vested with jurisdiction to decide whether the holder of a Certificate of Registration may lawfully hold it. *Id.* at 875.

This is precisely where the Second District goes astray. States may well have the authority to determine who among their government may claim entitlement to copyright protection for their works, which Florida has not done, but that does not grant a state court jurisdiction to decide who is entitled to hold a copyright. That explains the dearth of case law from any state court, decide the issue of who has authority to hold a copyright, as the Second District did in this case.

C. The Second District Incorrectly Determined that Florida's Public Records Law Abrogates the Copyright Act.

Nothing in the Florida Public Records Law, Chapter 119, Florida Statutes, states which public official may or may not hold a copyright. The Second District Court of Appeal notes that "[t]he Florida public records law . . . requires State and local agencies to make their records available to the public for the cost of reproduction. This mandate overrides a governmental agency's ability to claim a copyright in its work unless the legislature has expressly authorized a public records exemption." *Id.* at 876 (citing § 119.07(1)(a), Fla. Stat.; Art. I, § 24, Fla. Const.) The Second District Court of Appeal thus misconstrues states' powers of abrogation as applied to copyright cases.

"It is evident that the congressional intent in § 106 was to protect the rights of copyright holders. . . ." *Foley v. Luster*, 249 F.3d 1281, 1287 (11th Cir. 2001). "Under Article VI of the U.S. Constitution, federal law is the 'supreme Law of the Land,' and any state law that is in conflict with a federal law is preempted." *Id.* at 1286. In *Sears, Roebuck and Co. v. Stiffel Company*, 376 U.S. 225, 84 S.Ct. 784 (1964), this Court held that federal copyright laws

> like other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land. *See Sperry v. Florida*, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963). When state law touches upon the area of these federal statutes, it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law. *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 172, 173, 176, 63 S.Ct. 172, 173, 87 L.Ed. 165 (1942). This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power.

Article VI, Clause 2, of the United States Constitution provides that when a state law conflicts with a federal law, the federal law must prevail. Federal law may preempt state law in three ways: 1) explicit preemption; 2) conflict preemption; and 3) field preemption. *Foley*, 249 F.3d at 1286-1289.

Explicit preemption occurs "when 'Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Id.* at 1286-87 (citing *Jones v. Ruth Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)). "Section 301 explicitly preempts all claims that are covered under § 106 of the Act, if they come within the subject matter of §§ 102 and 103. These include violations of the following rights: . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending. . . ." *Id.* at 1287.

"Conflict preemption 'arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 1287 (citing *Pacific Gas and Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983). This may occur when it is impossible to comply with both federal and state statutes or regulations or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1991).

Article I, Section 8, Clause 8 of the United States Constitution grants Congress the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries". Pursuant to that authority, Congress enacted the federal Copyright Act.

Section 301 of the Copyright Act which is entitled "Preemption with respect to other laws", specifically provides that:

> On or after January 1, 1978, all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by Sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state.

17 U.S.C. §301(a). This section has been held to be an express preemption provision. *Foley*, 249 F.3d at 1287, *Roth v. Pritkin*, 710 F.2d 934, 938 (2d Cir. 1983), cert. denied, 464 U.S. 961, 104 S.Ct. 394, 78 L.Ed.2d 337 (1983); *Association of American Medical Colleges v. Carey*, 728 F.Supp. 873 (N.D.N.Y. 1990).

Because the Second District Court of Appeal held that the Florida Public Records Law vitiates Petitioner's rights as granted by the Copyright Act, express preemption applies. *See Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3d Cir. 1999) (a Pennsylvania statute banning exclusivity of film exhibitions after forty-two days of showing of the film was preempted by the Copyright Act.); *Ehat v. Tanner*, 780 F.2d 876, 878 (10th Cir. 1985) (state common law protections of copyright holders' work were preempted). *Richard Feiner & Co. v. H.R. Industries, Inc.*, 10 F.Supp. 2d, 310 (S.D.N.Y. 1998) (Section 301 of the Copyright Act provides for preemption of all state claims that are tantamount to those falling within the scope and subject matter of Copyright Law).

In addition to express preemption, conflict preemption also applies because the Second District's holding is an interpretation of Public Records Law that conflicts with the federal Copyright Act. Petitioner has an exclusive right pursuant to Section 106 of the Copyright Act (17 U.S.C. §106) to distribute Collier County's GIS tax maps. This copyright grants Petitioner the right to refuse to allow another entity to distribute the maps. The Second District's interpretation of the Public Records Laws abrogates Petitioner's exclusive right to distribute the copyrighted GIS tax maps produced by his office.

In *Association of American Medical Colleges v. Carey*, 728 F.Supp. 873 (N.D.N.Y. 1990), an educational association which held copyrights to its medical school

admissions tests, brought an action challenging the disclosure requirements of New York State's Standardized Testing Act. The Association moved for summary judgment, claiming that the portions of the state statute which required disclosure of the copyrighted tests were preempted by the Copyright Act of 1976. The college argued that conflict preemption was the legal basis for its claim. The state argued that the statute codified the 'fair use' exception and the archiving exception contained within the Copyright Act.

The district court stated in pertinent part that the "express preemption provision of 17 U.S.C. §301, which through its terms and the legislative history surrounding its enactment, 'makes clear a congressional intent to preempt previous law and replace the labyrinth of statutory and common law authority with a single, generally applicable federal statute.'" *Association of American Medical Colleges*, supra, 728 F.Supp. at 876, quoting from *Roth v. Pritkin, supra*. The court referred to decisions in other circuits and held that it was clear that "a state may neither abrogate nor in any way diminish the federally granted and protected rights of a copyright holder." Id. at 874, citing *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979); *Bell v. Combined Registry Co.*, 397 F.Supp. 1241, 1245 (N.D.Ill. 1975), aff'd. 536 F.2d 164 (7th Cir.), cert. denied, 429 U.S. 1001, 97 S.Ct. 530, 50 L.Ed.2d 612 (1976).

Plaintiff in *Association of American Medical Colleges, supra*, claimed conflict preemption. In *Association of American Medical Colleges*, the plaintiff argued that the New York statute denied it the benefits it was entitled under Section 106 of the Copyright Act (17 U.S.C. §106 The district court rejected defendant's fair use and archiving defenses and held that the disclosure provisions of the state statute were preempted due to direct conflict with the federal Copyright Law. *American Association of Medical Colleges,*

supra.). The Second District's interpretation of the Florida Public Records Law operates to deny Petitioner benefits conferred upon his office by the same provision.

On appeal, the Second Circuit Court of Appeals reaffirmed the fact that if the state statute facilitates infringement, it conflicts with the federal Copyright Act and is preempted. *Association of American Medical Colleges v. Cuomo*, 928 F.2d 519, 523 (2d Cir. 1991), cert. denied, 502 U.S. 862, 112 S.Ct. 184, 116 L.Ed.2d 146. The Second Circuit reversed and remanded for further factual determinations concerning 'fair use' exception issues and continued the injunction of enforcement of the state statute. 928 F.2d at 526.

In the instant case the plain language of Florida's Public Records Laws do not create any conflict with the Copyright Act. The Florida Public Records Law requires that Petitioner provide access to his office's records, and he has always provided public access to the copyrighted tax maps and the source code from which they are printed, whether that be accomplished in person, via the Internet, or by mail. The licenses with the source code and maps contain copyright warnings with regard to further dissemination without a license. Petitioner is in full compliance with Public Records Law. The Public Records Law by its unambiguous terms does not facilitate copyright infringement.

The Second District erroneously expands Florida's Public Records Law to facilitate copyright infringement in this case. As a result of its decision, Respondent is free to ignore Petitioner's Certificate of Copyright and reproduce and sell Petitioner's maps. The Second District has clearly violated the Supremacy Clause. The court did so by disregarding the one case that has reviewed the precise

issues surrounding the exact same subject matter as in this case, *First American, supra.*

II. THE SECOND DISTRICT'S DECISION, AND THE FLORIDA SUPREME COURT'S REFUSAL TO REVIEW THE CASE RESULTS IN CONFLICT BETWEEN A FLORIDA STATE COURTS AND THE SECOND CIRCUIT COURT OF APPEALS OVER THE VERY SAME ISSUE.

First American, supra, is the only other case in the nation addressing the issue of government authority to copyright GIS source code and tax maps. Although case law from the Federal Second Circuit Court of Appeals is only persuasive to a case in state court in Florida, inasmuch as the subject matter in that case is identical to the present case, and the real estate information vendor in that case made the exact same argument being made in the present case, to wit, that the state Public Records Law abrogates the governing body's copyright, the case should have been reviewed very closely indeed.

In *First American*, the County brought suit under the Copyright Act, 17 U.S.C. § 101 *et. seq.*, against First American (and assorted other companies acquired by First American)("information vendors"), alleging that First American infringed its copyrights in its GIS tax maps by publishing and marketing those maps without Suffolk County's permission. *First American*, 261 F.3d at 183. The information vendors moved to dismiss for failure to state a claim, arguing that the County had no authority to assert a copyright in its tax maps. *Id.* The information vendors argued that New York's public records law, the Freedom of Information Law ("FOIL") abrogated the County's copyright, leaving the County without authority to seek

copyright protection for its tax maps. *See* N.Y. Pub. Off. Law § 84 *et seq.* (McKinney Supp. 2001).

The Second Circuit answered the question of whether the New York Legislature intended to or indeed, could abrogate a covered entity's copyright when it enacted FOIL, in the negative. *Id.* at 188.

> FOIL provides only that '[e]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records,' subject to certain exceptions that are not relevant here. N.Y. Pub. Off. Law § 87(2) (McKinney Supp. 2001); *see also id.* § 89(3) (McKinney Supp. 2001) (requiring each entity subject to FOIL to provide the person requesting the record access or a written denial of access, and for those records to which it provides access, to provide, upon payment of a fee, a copy of the record to the requester). FOIL is silent as to the existence of, and the effect of requiring disclosure on, any preexisting copyright the state agency may possess. FOIL is also silent as to what may occur after a state agency discloses its records. . . . By the statute's plain language, the extent of the state agency's obligation is to make its records available for public inspection and copying. **It is one thing to read this provision to permit a member of the public to copy a public record, but it is quite another to read into it the right of a private entity to distribute commercially what it would otherwise, under copyright law, be unable to distribute.**

Id. at 188-89 (emphasis added). Like Respondent in this case, the information vendors in Suffolk County who include amicii in the Second District Court of Appeal, trumpeted the policies favoring broad access to governmental documents and the presumption of openness inherent in the state's Public Records Law. *Id.* The court rejected the broad policy argument because it

> require[d] a degree of inference that fails to overcome the limited scope of the obligations dictated by the plain language of the act--that a state agency must make its records available for public inspection. Moreover First American ignores the fact that the free press or an individual seeking to use the state agency records to educate others or to criticize the state or the state agency may be protected by the Copyright Act's fair use doctrine.

Id. at 189. (*citing* 17 U.S.C. § 107; *On Davis v. The Gap, Inc.*, 246 F.3d 152, 173-76 (2d Cir. 2001).

The Second Circuit Court of Appeals was very clear in its decision: the County could maintain its copyright protections in the GIS tax maps, while complying with its obligations under FOIL. *First American*, 261 F.3d at 191-92. Like the Petitioner in the present case, Suffolk County was not trying to restrict *initial access*, but was attempting to restrict only the *subsequent redistribution* of its copyrighted works. *Id.* The Second Circuit found "nothing inconsistent between fulfilling FOIL's goal of access and permitting a state agency to place reasonable restrictions on the redistribution of its copyrighted works." *Id.* "For example, an agency's choice to notify the recipient that a portion of the record is protected by copyright law or an agency's requirement that the recipient enter into a licensing

agreement if it wishes to distribute the record commercially does not restrict *initial access* but only what the recipient may do once it acquires access." *Id.* (Emphasis added).

Although the information vendors in *First American* did not withhold the fee prescribed by law, in order to cultivate the case as a public records case, the same rationale holds true in the present case. Strikingly similar to Florida's Public Records Act, FOIL guarantees the right to inspect and copy public records, and to receive a copy of the record upon payment of the fee prescribed by law. N.Y. Pub. Off. Law §§ 87(2), 89(3) (McKinney Supp. 2001). While the information vendors in *First American* were guaranteed the right to copy, copy and copy again, the Second Circuit held in no uncertain terms that this did not translate into the right to sell, sell, and sell again, that which it would be unable to sell under copyright law. *First American*, 261 F.3d at 189.

Respondent and *Amicii* argued to the Second District Court of Appeal that the Second Circuit utilized a narrow interpretation of FOIL to which New York courts might not subscribe. The Second District's interpretation of the Florida Public Records Law operates to deny Petitioner benefits conferred upon his office by the same provision. Although the Second Circuit indeed chose not to add words to the statute as sought by the information vendor in that case, the court hardly applied an interpretation of FOIL any more narrow than a state court would apply. The Second Circuit noted that because the Copyright Act only precludes the United States government from owning copyrights, states and their subdivisions can own copyrights. *First American*,

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[1] *Citing Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 735-36 (1st Cir. 1980)("Works of state governments are therefore left available for copyright protection by the state or the individual author. . . ."); *Nat'l Conf. of Bar Exam'rs v. Multistate Legal Studies, Inc.*, 495 F.Supp. 34, 35 (N.D. Ill. 1980); *aff'd* 692 F.2d 478 (7th Cir. 1982); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.06[A], at 5-81 n.1 (2001). The Second District Court

261 F.3d at 187. The court notes that "although a state and its subdivisions may own a copyright as a matter of copyright law, it may be that Suffolk County is not permitted to do so in this instance. The question becomes whether New York's Legislature, by enacting FOIL, has ceded Suffolk County's copyright." *Id.* at 188. In deciding that FOIL did not abrogate the county's copyright, the court noted that the plain language of FOIL [like Florida's Constitutional and statutory Public Records Law] guaranteed the right to access to and copy public records. *Id.* The court's reluctance "to read into [FOIL] the right of a private entity to distribute commercially what it would otherwise, under copyright law, be unable to distribute," is a court merely following the language of the statute. *Id.* at 189.

The Second District had no such reluctance to add words to Florida's statutory and constitutional public records provisions. While noting that state and local agencies are required to make records available to the public for the cost or reproduction, the court continues by finding that these requirements override a governmental agency's ability to claim a copyright in its work. *MicroDecisions*, 889 So. 2d at 876.

First American bears yet another striking similarity to the present case. In each case, an advisory opinion was sought and received during the pendency of the action. *See County of Suffolk v. Experian Information Solutions, Inc.*, 2000 WL 1010262 (S.D.N.Y.) (granting the information vendor's Motion for Reconsideration based upon the

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of Appeals copyrights its web page, <http://www.2dca.org/index.htm>, the authority for which comes from the Copyright Act. Based upon MICRODECISIONS' theory that the Public Records Laws abrogate the Copyright Act, that Court would be susceptible to suit under the Public Records Act were it to seek to license commercial use of the public records on its web site.

advisory opinion rendered prior to the expiration of the period for rehearing and granting the vendor's Motion to Dismiss)(vacated by *First American*). The window of time for reconsideration of the trial court's ruling in this case ran before the information provider could get anyone to request an advisory opinion from the Attorney General, so the Florida Attorney General's opinion came before the Second District Court of Appeal in the first instance, rather than the trial court. Nevertheless, the opinions in both cases are advisory, not binding[3], and both suffer from the same flaw: they add the right to commercially distribute records to the respective Public Records Laws in each case. Both opinions incorrectly assume that the respective States have the power to abrogate federal copyright law, and that they did so abrogate the copyrights involved.[4] Like the court did in *First American*, this Court should find that the Attorney General's September 3, 2003 opinion regarding copyrighting GIS source code and tax maps does not accurately state Federal law.

Florida's citizens reserved only the right "to inspect or copy any public record." Art. I, § 24, Fla. Const. Section 119.07(1)(a), Florida Statutes, guarantees inspection and examination of records, and guarantees that citizens will be furnished with copies of public records upon payment of the fee prescribed by law. These together guarantee the exact same right of access to public records that FOIL does. Florida's Constitutional Public Records Laws, like FOIL,

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[3] *Leadership Housing, Inc. v. Department of Revenue*, 336 So. 2d 1239 (Fla. 4th DCA 1976).

[4] Interestingly, the Florida Attorney General remembered the Supremacy Clause in his June 6, 2003 opinion involving copyrights and public records, *Op. Fla. Atty. Gen.* 2003-26, forgotten before rendering the September 3, 2003 AGO regarding copyrighting GIS tax maps, *Op. Fla. Atty. Gen.* 2003-42.

guarantee no right to re-sell those same records commercially.

Respondent's suggestion that a New York state court might apply a less narrow construction of the law than the Second Circuit applied in *First American* proved to be remarkably prescient in the present case, given the eagerness with which the state court added unwritten guarantees to Florida's Public Records Law. This underscores the importance of state courts respecting the jurisdictional constraints put in place in the U.S. Code regarding copyright.

CONCLUSION

The petition for a writ of certiorari should be granted.

Skinner v. MicroDecisions, Inc.
2005 WL 623446, 902 So.2d 791 (Table) Fla. 2005.

Supreme Court of Florida.

Friday, April 22, 2005
CASE NO. SC05-255

Lower Tribunal No.: 2D03-3346

Abe Skinner, etc., Petitioner(s)
vs.
MicroDecisions, Inc., Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

The motion for attorney's fees is granted and it is ordered that respondent shall recover from petitioner the amount of $2,500.00 for the services of respondent's attorney in this Court.

PARIENTE, C.J. and WELLS, ANSTEAD, LEWIS and QUINCE, JJ. Concur.

Appeal From: 2nd DCA, 889 So.2d 871
Disposition: Rev.den.

MICRODECISIONS, INC., Appellant, v. ABE SKINNER, as Collier County Property Appraiser, Appellee.

Case No. 2D03-3346

COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

889 So. 2d 871;2004 Fla. App. LEXIS 18167;Copy. L. Rep. (CCH) P28,910;73 U.S.P.Q.2D (BNA) 1533;29 Fla. L. Weekly D 2685

December 1, 2004, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication January 28, 2005. Review denied by, Motion granted by Microdecisions, Inc. v. Skinner, 2005 Fla. App. LEXIS 1861 (Fla. Dist. Ct. App. 2d Dist., Jan. 10, 2005)
Review denied by Skinner v. Microdecisions, Inc., 2005 Fla. LEXIS 1034 (Fla., Apr. 22, 2005)

PRIOR HISTORY: [*1] Appeal from the Circuit Court for Collier County; Ted H. Brousseau, Judge.

Microdecisions, Inc. v. Skinner, 2003 U.S. Dist. LEXIS 14846 (M.D. Fla., Feb. 5, 2003)

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JUDGES: NORTHCUTT, Judge. STRINGER and DAVIS, JJ., Concur.

OPINION BY: NORTHCUTT

OPINION: NORTHCUTT, Judge.

The issue before us is whether a county property appraiser may require prospective commercial users of the records created in his office to first enter into a licensing agreement. We conclude that he may not. For this reason, we reverse the summary judgment in favor of Abe Skinner, the Collier County Property Appraiser, and remand with directions to enter judgment for Microdecisions, Inc.

The facts in this case are uncontested. Microdecisions compiles data concerning real estate in south Florida, then sells this product on its website. Its customers can pay to retrieve plats, maps, and information about property values and mortgage encumbrances, among other things. With this purpose in mind, Microdecisions sought copies of Geographic Information Systems (GIS) maps that Skinner created in the course of his official duties. No one disputes that the GIS maps are public records, n1 but Skinner claimed they were copyrighted under federal law. [*3] He refused to permit Microdecisions' unfettered use of the maps unless it agreed to a licensing agreement that required a royalty payment if the maps were used commercially.

Microdecisions filed a petition for writ of mandamus and a declaratory judgment action in circuit court, seeking to compel Skinner to provide the public records unencumbered by the licensing agreement. Skinner filed affirmative defenses, and eventually both parties moved for summary judgment.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Section 119.011(1), Florida Statutes (2002), defines "public records" as:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. In turn, section 119.011(2) defines an "agency" as any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law . . . .

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*4]

We review a summary judgment de novo. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). The circuit court based its decision to grant Skinner's summary judgment motion on two of his affirmative defenses. The court's first ground was that Microdecisions' claim under Florida's public records laws was moot. Skinner maintained that after the lawsuit was filed, he sent Microdecisions a set of CD-ROM discs containing the maps. Thus, he argued, Microdecisions' claim was moot because the company had been given the public records. But the maps were transmitted with a letter that enclosed "a copy of the

Personal Use License Agreement that does not permit commercial use of the data in any manner." The license agreement purported to bind the user if the discs were used. Microdecisions was unwilling to agree to the restriction. A case is moot only "when the controversy has been so fully resolved that a judicial determination can have no actual effect." Montgomery v. Dep't of Health & Rehabilitative Servs., 468 So. 2d 1014, 1016 (Fla. 1985). Here, Microdecisions sought unconditional access to the public records, including the right [*5] to use the records in its business, but Skinner delivered the GIS maps on the condition that they were for personal use only. Therefore, the controversy concerning whether Skinner can validly impose this restriction on the use of the maps remained at issue. The circuit court erred as a matter of law in finding that the public records claim was moot. See WFTV, Inc. v. Robbins, 625 So. 2d 941, 943 (Fla. 4th DCA 1993) (reversing the denial of a petition for writ of mandamus as moot when the issues presented were still live and the parties had a legally cognizable interest in the outcome).

The circuit court's second basis for the summary judgment was that the case involved a copyright issue that should be decided by a federal court. Skinner's affirmative defenses claimed that Microdecisions' legal actions were actually an attempt to litigate his right to copyright the maps and that federal courts had exclusive jurisdiction over copyright actions under 28 U.S.C. § 1331. Early in the suit, Skinner filed a notice of removal to the United States District Court for the Middle District of Florida, again contending that the federal court had exclusive [*6] jurisdiction. But that court remanded the case to state court. The order of remand pointed out that the presence or absence of federal question jurisdiction is governed by the "well-pleaded complaint" rule. See Rivet v. Regions Bank of La., 522 U.S. 470, 474-75, 139 L. Ed. 2d 912, 118 S. Ct. 921 (1998). The district court noted:

> The well-pleaded complaint in this case alleges that the documents are public records to which the Property Appraiser must allow access pursuant to Florida law, without further restriction. Nothing about the claims in the Complaint arise out of federal law in general or the Copyright Act in particular, and they do not satisfy the test articulated by the Eleventh Circuit. Sullivan v. Naturalis, Inc., 5 F.3d 1410, 1412 (11th Cir. 1993).

Microdecisions, Inc. v. Skinner, No. 2:02-cv-639-FTM-29DNF, 2003 U.S. Dist. LEXIS 14846 (M.D. Fla. Feb. 5, 2003 (unpublished order). It concluded that Microdecisions' complaint did not state causes of action that arose under federal copyright law.

The federal court's well-reasoned order is supported by Florida law as well. The First District addressed similar facts in Department of Health & Rehabilitative Services v. Southpointe Pharmacy, 636 So. 2d 1377 (Fla. 1st DCA 1994). [*7] In that case, the pharmacy filed a petition for writ of mandamus seeking documents pursuant to Florida's public records law, section 119.07, Florida Statutes. As in this case, the complaint did not allege a cause of action under the federal copyright law, but the public entity defended on the ground that the documents were copyrighted. The Southpointe court held that under the federal well-pleaded complaint rule a copyright defense does not defeat state court jurisdiction. 636 So. 2d at 1380. As such, the Florida state courts had jurisdiction over the matter.

This case, like Southpointe, arises under Florida's public records law, not under federal copyright law. Copyright is not an essential element of Microdecisions' claim. As such, as a matter of both federal and Florida law, the circuit court erred when it determined this controversy belonged in federal

court. And, as we have previously discussed, Microdecisions' public records claim is not moot. Accordingly, we reverse the judgment in favor of Skinner.

The issue presented here is purely one of law; the facts are undisputed. We therefore examine whether the circuit court erred [*8] in denying Microdecisions' cross-motion for summary judgment. See Bridgham v. Skrzynski, 873 So. 2d 496, 499 (Fla. 2d DCA 2004); Royal Neth. Realty, Inc. v. Ross, 421 So. 2d 642, 643 (Fla. 3d DCA 1982). We hold that Skinner has no authority to assert copyright protection in the GIS maps, which are public records. Accordingly, Microdecisions was entitled to summary judgment as a matter of law.

Congress explicitly denied copyright protection to works of the United States government, 17 U.S.C. § 105, but it did not restrict state governments in that regard. "Works of state governments are therefore left available for copyright protection by the state or the individual author, depending on state law and policy, and subject to exceptions dictated by public policy . . . ." Bldg. Officials & Code Adm'rs, Inc. v. Code Tech, Inc., 628 F.2d 730, 735-36 (1st Cir. 1980); see also County of Suffolk, N.Y. v. First Am. Real Estate Solutions, 261 F.3d 179, 188 (2d Cir. 2001). Thus, Florida law determines whether Skinner may claim a copyright in his office's creations.

In Florida, a citizen's right of access [*9] to public records is protected both by the Florida Constitution and the Florida statutes. Art. I, § 24(a), Fla. Const. (1992) (the "Sunshine Amendment"); ' 119.01, Fla. Stat. (2002). Although the Sunshine Amendment was not adopted until 1992, Florida has a long-standing legal tradition of permitting access to its public records. See In re Report & Recommendations of Judicial Mgmt. Counsel of Fla. on Privacy & Elec. Access to Court Records, 832 So. 2d 712, 713 (Fla. 2002) (stating that

in Florida "open access to public records is both a constitutional right and a cornerstone of our political culture"). Our first public records law was enacted in 1892. §§ 1390, 1391, Fla. Stat. (Rev. 1892). Its existing progeny, section 119.01(1), declares the policy that "all state, county, and municipal records shall be open for personal inspection by any person."

The custodian of any public record must furnish a copy of the record upon payment of the fee prescribed by law, generally the cost of reproduction. § 119.07(1)(a). A requester's motive for seeking a copy of documents is irrelevant. News-Press Pub. Co. v. Gadd, 388 So. 2d 276, 278 (Fla. 2d DCA 1980). [*10] Moreover, the fact that a person seeking access to public records wishes to use them in a commercial enterprise does not alter his or her rights under Florida's public records law. Since 1905, it has been clear that public records may be used in a commercial, profit-making business without the payment of additional fees. See State ex rel. Davis v. McMillan, 49 Fla. 243, 38 So. 666 (Fla. 1905). McMillan interpreted the 1892 statute, which provided that public records shall be open to the public "for the purpose of inspection thereof, and of making extracts therefrom." Id. at 667. In that case the clerk of the court had argued that he could prevent employees of an abstract company from taking extracts from the public records to be compiled and sold unless the company paid him large amounts for inspecting the records and extracting them. The court held that the public records law forbade such a demand for fees. Id.

To be sure, the legislature may exempt specific public records from the public records law. See Bevan v. Wanicka, 505 So. 2d 1116, 1118 (Fla. 2d DCA 1987). The Sunshine Amendment permits the legislature, by two-thirds vote, to [*11] enact exemptions for public records, but only after specially defining a public necessity and narrowly tailoring the exemption to that necessity. Art. I., § 24(c), Fla. Const.

Accordingly, the legislature has allowed restrictions on the unlimited access to some public records by enacting specific statutes authorizing certain agencies to obtain copyrights in particular circumstances. See, e.g., § 24.105(10), Fla. Stat. (2003) (authorizing the Department of the Lottery to hold copyrights); § 601.101, Fla. Stat. (2003) (permitting the Department of Citrus to hold legal title to copyrights); § 1004.23, Fla. Stat. (2002) (authorizing universities to secure copyrights in certain works). No statute authorizes a county property appraiser to hold a copyright.

Additionally, the legislature has specifically permitted certain categories of public records to be copyrighted. Section 119.084 permits agencies to acquire and hold copyrights for data processing software the agencies have created. n2 The staff analysis of the Senate bill that created section 119.084 recognized that a law permitting copyright protection [*12] of public records creates a public records exemption as contemplated in the Sunshine Amendment. Therefore a statement of public necessity was required under the Sunshine Amendment and was included in the bill. See Fla. S. Comm. on Comprehensive Planning, CS for SB 2220 (2001) Staff Analysis (Apr. 10, 2001) (on file with comm.).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 Skinner does not claim that section 119.084 applies to the public records at issue here. Moreover, Florida's attorney general has opined that GIS maps

> "do not appear to constitute 'data processing software' as defined in section 119.084(1)(b), Florida Statutes, and thus are not subject to the copyright and licensing authorization contained in that statute." Op. Att'y Gen. Fla. 03-42 (2003).

- - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

In his brief, Skinner claims that nothing in the Florida Statutes precludes a constitutional officer such as himself from holding a copyright on the GIS maps. He misconstrues the interplay between the federal copyright act and Florida's public records [*13] laws. The copyright act gives the holder the exclusive rights to reproduce and distribute a work and to authorize others to do so. 17 U.S.C. § 106(1), (3). As such, a copyright owner may refuse to provide copies of the work or may charge whatever fee he wants for copies of the work or a license to use the work. The Florida public records law, on the other hand, requires State and local agencies to make their records available to the public for the cost of reproduction. § 119.07(1)(a). This mandate overrides a governmental agency's ability to claim a copyright in its work unless the legislature has expressly authorized a public records exemption. See Art. I. § 24, Fla. Const.; see also Op. Att'y Gen. Fla. 03-42 (2003) (stating that in the absence of statutory authorization and "in light of Florida's Public Records Law, Palm Beach County is not authorized to obtain copyright protection and require license agreements for its Geographic Information Systems (GIS) and related data in order to regulate and authorize redistribution of these materials for commercial use"); Op. Att'y Gen. Fla. 88-23 (1988) (reciting that State Attorneys may not, without statutory [*14] authority, assert copyright in training films they produced); accord Op. Att'y Gen. Fla. 00-13 (2000) ("[A] state agency is not authorized to secure or hold a trademark in the absence of specific statutory authority to do so."). Skinner has not claimed that any public records exemption applies, and indeed we have found none that do.

We recognize that in Suffolk County, the Second Circuit held that the New York Freedom of Information Law did not prevent a county from holding a copyright in GIS maps the county had produced. 261 F.3d at 195. But New York law is not Florida law.

We offer no opinion on the federal circuit's analysis because it simply has no application in this case. Each state may determine whether the works of its governmental entities may be copyrighted. Code Tech, 628 F.2d at 735-36; see also 1 Melville and David Nimmer, Nimmer on Copyright § 5.14, at 5-106 (2002). As we have explained, Florida's Constitution and its statutes do not permit public records to be copyrighted unless the legislature specifically states they can be.

Accordingly, we hold that Skinner cannot prevail on his defense [*15] of copyright. Microdecisions is entitled to summary judgment as a matter of law. We reverse the summary judgment entered in Skinner's favor and remand with directions to enter summary judgment in favor of Microdecisions.

Reversed and remanded.

STRINGER and DAVIS, JJ., Concur.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MICRODECISIONS, INC., a Florida Corporation,

Plaintiff

vs. Case No. 2:02-cv-639-FTM-29DNF

ABE SKINNER, CFA, as Property Appraiser of Collier County, Florida,

Defendant.

ORDER

This matter comes before the Court on Plaintiff Microdecisions Motion to Remand (Doc. #13), filed January 13, 2003. Defendant filed a Memorandum of Law in Opposition (Doc. #15) on January 22, 2003. Also before the Court is plaintiff's Motion for Costs and Fees (Doc. #12) and defendant's Memorandum of Law in Opposition (Doc. #14).

Plaintiff's two count Complaint for Declaratory and Injunctive Relief and for Writ of Mandamus for Access to Public Records (Doc. #2) (the Complaint) was originally filed in the Twentieth Judicial Circuit Court, in and for Collier County, Florida. The Complaint seeks to compel defendant Abe Skinner, as the Collier County Property Appraiser, to release certain geographic information systems (GIS) documents and tax maps pursuant to Florida's public records laws. Defendant filed a timely Notice of Removal (Doc. #1), asserting that he had filed a claim of copyright for the records at issue with The Copyright Office, that the case arose under the Copyright Act within the meaning of 28 U.S.C., § 1338, and

that the case was therefore removable.

Plaintiff's motion to remand asserts that the Court lacks subject matter jurisdiction because the claims do not "arise under" the Copyright Act, and therefore the case must be remanded to state court. On a motion to remand, the party seeking to invoke federal jurisdiction bears the burden of establishing the jurisdiction of the federal court. Williams v. Best Buy Co., Inc., 269 F. 3d 1316, 1319 (11th Cir. 2001). Thus, the burden of establishing federal question jurisdiction in this case is upon defendant.

I.

Removal jurisdiction exists only where the district court would have had original jurisdiction over the action, unless Congress expressly provides otherwise. 28 U.S.C. § 1441(a); Darden v. Ford. Consumer Fin. Co., Inc., 200 F.3d 753, 755 (11th Cir. 2000). In this case, defendant invoked a district court's original jurisdiction over "any civil action arising under any Act of Congress relating to ... copyrights ...." 28 U.S.C. § 1338(a). Because § 1338(a) is substantially identical to the general federal question jurisdiction statute, 28 U.S.C. § 1331, the same law applies to it.

A cause of action "arises under" federal law only when plaintiff's well-pleaded complaint raises issues of federal law. Rivet v. Regions Bank of La., 522 U.S. 470, 474-75 (1998) summarized the well-pleaded complaint rule:

> We have long held that "[t]he presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987); see also Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908) . A defense is not part of a plaintiff's

> properly pleaded statement of his or her claim. See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 56, 63 (1987); Gully v. First Nat. Bank in Meridian, 299 U.S. 109, 112 (1936) ("To bring a case within the [federal-question removal] statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.") Thus, "a case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 14 (1983).

Rivet also noted that an independent corollary to the well-pleaded complaint rule is that a plaintiff may not defeat removal by artful pleading which omits federal claims from the face of the complaint. Id. at 475. See also Behlen v. Merrill Lynch, 311 F.3d 1087, 1090 (11th Cir. 2002); Anderson v. H&R Block, Inc., 287 F.3d 1038, 1041- 42 (11th Cir. 2002.)

II.

The first task is to determine what the Complaint alleges, keeping in mind both that it must be well-pleaded and yet not artfully pleaded. The well-pleaded complaint in this case alleges that the documents are public records to which the Property Appraiser must allow access pursuant to Florida law, without further restriction. Nothing about the claims in the Complaint arise out of federal law in general or the Copyright Act in particular, and they do not satisfy the test articulated by the Eleventh Circuit. Sullivan v. Naturalis, Inc., 5 F.3d 1410, 1412 (11th Cir. 1993). Plaintiff has simply reported

defendant's reliance on the federal copyright law to deny the access sought by plaintiff) Doc. #2, ¶¶ 13, 25), and anticipated a Copyright Act defense by discussing it in the Complaint. As the cases cited above discussed, merely anticipating a federal defense in a complaint is insufficient to satisfy the "arise under" standard. See also State Dept. Of Health and Rehabilitative Servs. v. Southpointe Pharmacy, 636 So.2d 1377, 1380 (Fla. 1st DCA 1994). The Court concludes that the Complaint does not state causes of action which arise under the federal copyright laws.

Defendant argues that the exception to the well-pleaded complaint rule applies in this case because federal copyright law completely preempts the state law claims. "Federal courts have not extended federal subject matter jurisdiction to every lawsuit involving copyrighted material, however." Sullivan v. Naturalis, Inc., 5 F.3d at 1412. See also Foley v. Luster, 249 F. 3d 1281, 1285 (11th Cir. 2001). The Court concludes that the Copyright Act does not completely preempt the state law public records access claims in the Complaint.

The award of costs and expenses, including attorney fees, is a matter within the sound discretion of the court. Fowler v. Safeco Ins. Co. Of Am., 915 F.2d 616, 617 (11th Cir. 1990). Fees and costs may be awarded even though the removing party did not act in bad faith. Mints v. Educational Testing Serv., 99 F.3d 1253, 1260 (3d Cir. 1996); Publix Supermarkets, Inc. v. United Food & Commercial Workers Int'l Union, 900 F. Supp. 419, 421-22 (M.D. Fla. 1995) The propriety of defendant's removal is the central consideration in determining whether to impose fees. Miranti v. Lee, 3 F.3d 925, 928 (5th Cir. 1993). While the Court ultimately disagrees with defendant's arguments concerning removal, the Court exercises its discretion and finds that fees and costs will not be awarded.

Accordingly, it is now

ORDERED:

1. Plaintiff Microdecisions, Inc.'s Motion to Remand (Doc. #13) is **GRANTED**. The Clerk is **directed** to remand

the case to the Circuit Court of the Twentieth Judicial Circuit, in and for Collier County, Florida, and to transmit a certified copy of this Order to the Clerk of that Court.

2. Plaintiff's Motion for Costs and Fees (Doc. #12) is **DENIED**.

3. The Clerk is **directed** to close this case and terminate all previously scheduled deadlines as **moot**.

DONE AND ORDERED at Fort Myers, Florida, this 5th day of February, 2003.

S

JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies:
Clerk, Circuit Court, Collier County
Hon. Douglas N. Frazier
Counsel of record
District Courtroom Deputy
District Law Clerk

No. 05-383

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

ABE SKINNER, as Collier County (Fl) Property Appraiser,

Petitioner,

v.

MICRO DECISIONS, INC., a Florida Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Second District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent disagrees with the manner in which the Petitioner framed the question presented and respectfully restates the question as follows:

Whether a state court has jurisdiction to determine whether copyright may be asserted in the records of the state.

PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner correctly identified the parties. Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent states that it is a nongovernmental corporation, that it has no corporation and no publicly held company owns 10% or more of the corporation's stock.

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STATEMENT OF THE CASE

This case presents the simple question of whether federal or state law determines whether a state will assert the subsisting copyright in its records. It is well established that this determination is left to each state and Florida has determined, with rare exceptions, not to enforce the copyright in its records. The exceptions (where the right to assert copyright in documents created by state agencies has been legislatively granted) prove the rule. Florida's determination on this point is further exemplified by the depth and breadth of Florida's public records law which brooks no restrictions on access to government records unless a carefully crafted statutory exemption applies.

Petitioner, Abe Skinner, as Property Appraiser of Collier County Florida produces the GIS tax maps which are the public records at issue in this case. Respondent, MicroDecisions, Inc., requested a copy of the maps pursuant to Florida's public records law. Skinner offered to either provide the maps for the statutorily permissible cost and subject to a personal use license or to provide the maps at a cost of approximately 100 times the statutorily permissible cost if MicroDecisions wished to use the maps for a commercial purpose. As Skinner is not entitled to assert the copyright in the requested records, this constituted a violation of Florida's public records law.

Unable to persuade Skinner of the error in his position, MicroDecisions filed its complaint for declaratory and injunctive relief and for a writ of mandamus for access to the requested records. The court issued the writ of mandamus requiring Skinner to produce the records. MicroDecisions faxed the writ to Skinner's counsel and delivered

the writ to the sheriff for service, as instructed by the court. While awaiting the completion of service (which included payment of the statutory fee), MicroDecisions received the disks from Skinner allegedly containing the records, along with a copy of the personal use license and a letter advising that use of the records constituted assent to the license.

Skinner removed the case to the Middle District of Florida. MicroDecisions moved for remand, resulting in the remand order found in the appendix to the Petition. Petition for a Writ of Certiorari ("Pet.") 12a-16a. After remand, the parties filed cross motions for summary judgment. The trial court ruled that the case was moot because Skinner already had delivered the records and that the question of Skinner's authority to assert the copyright in the tax maps was within the exclusive jurisdiction of the federal courts. MicroDecisions appealed to the Florida Second District Court of Appeal and obtained a reversal of the trial court's judgment. Pet. 1a-11a.

The Second District agreed with MicroDecisions that Florida has determined not to assert the copyright in its public records and as a result, Skinner may not seek to enforce the copyright in the requested records against the public. Skinner sought review in the Florida Supreme Court, which declined to exercise its discretionary jurisdiction.

REASONS FOR DENYING THE PETITION

The parties agree that copyright vests in an original work at the time that such work is fixed in a tangible medium. 17 U.S.C. §102 ("Copyright protection subsists, in

accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . "). What Skinner fails to appreciate is that when the work is created by a state official, it is a question of state law whether the subsisting copyright may be asserted. *See, e.g., Building Officials & Code Adm'rs Int'l, Inc. v. Code Tech, Inc.*, 628 F.2d 730, 735-36 (1st Cir. 1980) (holding that "[w]orks of state governments are therefore left available for copyright protection by the state or the individual author, *depending on state law and policy*, and 'subject to exceptions dictated by public policy with respect to such publications as statutes and judicial opinions.'") (quoting LATMAN, THE COPYRIGHT LAW 43 (5th ed. 1979)) (emphasis supplied) and 1 MELVILLE AND DAVID NIMMER, NIMMER ON COPYRIGHT §5.14 (2005). Under Florida law, the subsisting copyright may not be enforced unless the legislature has enacted a specific statutory authorization permitting assertion of the copyright. This is purely a question of state law and the state has decided against Skinner.

I. WHETHER A STATE AGENCY OR OFFICIAL MAY ASSERT COPYRIGHT IN GOVERNMENT RECORDS IS A QUESTION OF STATE LAW.

Skinner commences his argument by citing 28 U.S.C. §1338(a) which provides that exclusive jurisdiction resides in the federal courts for "any civil action arising under" the Copyright Act. This case simply does not "arise under" the Copyright Act. This case arises under the Florida public records law. FLA. STAT. ch. 119.07 (2002). As Judge Steele held in the order remanding the case to the circuit court:

> The well-pleaded complaint in this case alleges that the documents are public records to which